SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 101

JAMES H. HALLIDAY, A PERSON NON COMPOS MENTIS, BY HIS COMMITTEE, ANNIE HALLIDAY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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This reply brief is directed to the brief filed by the United States in the order in which respondent's arguments were advanced.

Summary of Argument.

I.

RESPONDENT'S MOTION FOR A DIRECTED VERDICT SHOULD NOT HAVE BEEN GRANTED.

(A) There was ample substantial evidence of total disability.

(B) There was ample substantial evidence of permanency.

II.

A. THE CIRCUIT COURT OF APPEALS SHOULD NOT HAVE DIRECTED ENTRY OF JUDGMENT IN FAVOR OF THE UNITED STATES.

B. THE FACT THAT THE RECORD DOES NOT DISCLOSE WHAT MORE EVIDENCE PETITIONER COULD PRODUCE IN A SECOND TRIAL IS NO GROUND FOR REVERSAL.

C. EVEN ASSUMING THAT MOTION FOR JUDGMENT N. O. V. WOULD HAVE ACHIEVED NO DIFFERENT RESULT *in this case*, YET THAT IS NO REASON FOR ASKING THIS COURT TO APPROVE THE ACTION OF THE COURT BELOW AND THUS ESTABLISH THIS VERY DANGEROUS PRECEDENT.

III.

A. THAT PART OF THE DECISION OF THE COURT BELOW WHICH REFERS TO ALLEGED ERROR IN EXCLUDING EVIDENCE WAS *dictum* ONLY AND WAS NOT A PART OF THE COURT'S DECISION.

B. NO PROPER FOUNDATION WAS LAID BY RESPONDENT IN THE TRIAL COURT FOR RAISING A QUESTION AS TO THE ACTION OF THAT COURT IN EXCLUDING THIS EVIDENCE; AND RESPONDENT WAIVED ANY RIGHT THAT MIGHT HAVE EXISTED IN THIS RESPECT.

ARGUMENT

I.

Respondent's motion for a directed verdict should not have been granted.

(A) There was ample substantial evidence of total disability.

Total disability is defined by regulation (T. D. 20 W. R.) as any impairment of mind or body which renders it impos-

sible for the disabled person to follow continuously any substantially gainful occupation. The record here does not disclose that this insured, after April 2, 1919, the date the jury determined that he was totally and permanently disabled, ever did work regularly or continuously at any substantially gainful occupation.

A medical witness, who came in contact with the insured in 1919, and saw him from time to time until 1935, testified (R. 22-23):

> "* * * I would say his mental condition would keep him from working. He is not able to judge the necessity of the thing to be done about his business. I would not have advised him to do any work since he has been out of the Army. I think it would have been harmful to him. If he had just been put to work I think he would have a complete collapse, mentally and physically. He is not physically in good shape, and is mentally in bad shape. When he got out of the Army I didn't hold any hope for his recovery, a man in his condition will go from bad to worse."

From the foregoing, it is clear that work would have been harmful to the insured. One who has a serious and incurable ailment, for which rest is the recognized treatment and which will be aggravated by work of any kind, is nevertheless totally and permanently disabled, although he may for a time engage in gainful employment. One so incapacitated may only work at the risk of injury to his health and danger to his life. *Lumbra* v. *United States*, 290 U. S. 551, 54 S. Ct. 272, 78 L. Ed. 492; *Nicolay* v. *United States* (C. C. A. 10) 51 F. (2d) 170, 173; *United States* v. *Phillips*, (C. C. A. 8) 44 F. (2d) 689, 691; *Carter* v. *United States* (C. C. A. 4) 49 F. (2d) 221, 223; *United States* v. *Lawson* (C. C. A. 9) 50 F. (2d) 646, 651; *United States* v. *Barleyson*, (C. C. A. 9) 64 F. (2d) 868, 872; *United States* v. *Sorrow* (C. C. A. 5) 67 F. (2d) 372.

In *United States* v. *Sorrow*, *supra*, the court said:

> "One is totally disabled when he is not, without injury to his health, able to make his living by work."

It is not even necessary that the disease be classified. *United States* v. *Tyrakowski*, 50 Fed. (2d) 766, 7th C. C. A.

Respondent in its brief at page 9 asserts that the insured failed to take hospital treatment or other medical treatment for his mental condition after the expiration of insured's protection. The insured did go to hospitals when respondent sent him there, and the jury, from their own experience in life, undoubtedly knew that usually it is not until a mentally ill person becomes dangerous to himself and others that he is incarcerated in an insane asylum.

Dr. Land testified (R. 24):

> "He was not at all violent and I considered that if he could have somebody transact his little business for him, that since he was not violent it would not be necessary to commit him to an insane asylum."

Respondent, on page 20 of its brief, infers that the insured farmed regularly until about five years prior to trial. This inference is based upon a statement signed by the witness, J. M. Broyles, which was written (R. 14) by a representative of the government, who did not write down everything the witness told him (R. 13). To adopt respondent's contention about the insured's working, clearly would not be giving the evidence the inferences to which plaintiff is entitled under the circumstances. This witness further testified (R. 13): "He was never normal from the first time I knew him"; and (R. 11): "From the time he moved there through December 1935, what time I was with him and had occasion to see him he seemed to be all unbalanced, both mentally and physically and I told a Government man this several years ago. I didn't see how a man could work and

get along in the physical condition he was in. * * * I can't tell his own feelings, but from the way he acts is all I have to go by. I would not have hired him as a Farm hand at any time since 1925. I wouldn't want such labor as he would give me."

It was for the jury and not the Circuit Court of Appeals to pass upon the weight to be given all the testimony of all the witnesses. Considering this testimony as a whole, it clearly shows that the insured was totally and permanently disabled from working ever since the insured returned from the Army.

The respondent's own records show that while still in the Army in 1918, the insured was *nervous* (R. 28) and gave the impression to the government's examining physician of having neurasthenia. During the examination made of the insured by respondent's physician November 24, 1925 (R. 19) the insured appeared very *nervous*, and it was difficult for him to be still. This doctor's diagnosis then was psychoneurosis, *neurasthenic type*. On April 11, 1935, (R. 21) the last examination of record prior to the appointment of a committee for the insured (which occurred on December 9, 1935) a diagnosis of *neurasthenia* was made. At that time the respondent's physician who made the examination stated that no change was found in the insured's condition since his last examination. The examination prior to that was for the period September 13, 1933 to November 23, 1933.

This same diagnosis of neurasthenia was given to the insured prior to his discharge from the Army while he was in France in 1918; again in 1925; and again in 1935, by respondent's physicians. The last examination made of the insured prior to the appointment of a committee in 1935 showed this diagnosis, and from the standpoint of this diagnosis the jury could well have believed that while he was still in the service his condition then warranted the appoint-

ment of a committee; and that this was a permanent disability, this diagnosis having been made at different times over a period of years.

Further, report of February 14, 1921, shows (R. 18) hypochondriasis. Dr. Land testified (R. 25) that hypochondriasis and psychoneurosis were practically the same thing.

The reports of November 24, 1925 (R. 19) and April 11, 1935 (R. 22) show the same neurasthenic condition as explained by Dr. Land, who testified to facts of which he had personal knowledge and which he related to the jury, and showed conclusively that this insured had been unable to work. The jury, considering this evidence, pieced together the whole picture and then after considering all inferences fairly deducible from it properly returned a verdict for the plaintiff. This verdict should not be disturbed by the Circuit Court of Appeals, sitting many miles away from the scene of trial and with no opportunity to personally observe the witnesses.

In determining whether there was any evidence to sustain a verdict for the petitioner all facts that the evidence supporting his claim reasonably tends to prove should be assumed as established and all inferences fairly deducible from them should be drawn in his favor. *Lumbra* v. *U. S.*, *supra*.

B. There was ample substantial evidence of permanent disability.

The permanency of the insured's disability as shown by the evidence referred to herein clearly brings this case within the rule of law that as permanency of any condition (here total disability) involves the element of time, the continuance of disability during the passage of time is competent and cogent evidence. *McGovern* v. *United States*, 249 Fed. 108, cert. denied 267 U. S. 608.

We have here the opportunity to observe the effect the passage of time has had upon this insured's disability. His condition has not improved during these twenty years, but on the contrary, he has become worse physically and mentally. We respectfully submit that it is reasonable to presume that in view of the continuation of this disability over all these twenty-odd years it will continue the remainder of the insured's life. It is not believed that any more time is required in order to establish the permanency of this condition. However, if any time in the future the insured should recover the ability to follow continuously any substantially gainful occupation, then under the express terms of T. D. 20 W. R., which is still in full force and effect, the respondent here can cease making payments. T. D. 20 W. R. provides that in the event of the recovery of the insured from total and permanent disability, respondent discontinues benefits. Indeed the statute itself so provides.

II.

A. The Circuit Court of Appeals should not have directed entry of judgment in favor of the United States.

The particular question of interpretation of Rule 50 (b) of the Rules of Civil Procedure is whether the provision in the rule for a motion for a judgment, notwithstanding the verdict, is merely permissive or is mandatory. Clearly, the Court of Appeals may not grant a judgment, notwithstanding the verdict, unless the trial court could have done so. Thus, the question is whether the trial court was in a position to grant judgment, notwithstanding the verdict, and could have done so in the absence of a motion made in the trial court as provided in the rules for judgment, notwithstanding the verdict.

It is unfortunate that the rule contains any ambiguity and that it did not expressly provide that, in order to obtain

judgment, notwithstanding the verdict, the motion must be made. It seems clear, however, that notwithstanding there is no express provision in the rule requiring that the motion be made in order to entitle the defendant either in the trial court or on appeal to have judgment entered, notwithstanding the verdict, the necessary implication is that the motion must be made and that, failing to make it, all that the lower court may do is to grant a new trial, and all that the appellate court may do, if it is of the opinion that there was no evidence to go to the jury, is to grant a new trial.

To understand the rule, one must examine the background under which it was drawn. In *Slocum* v. *New York Life Insurance Co.*, 288 U. S. 364, and *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, this Court considered the question of whether an appellate court could grant judgment, notwithstanding the verdict, without depriving a party of his constitutional right to a jury trial. The net result of these decisions at the time the Federal Rules of Civil Procedure were drawn was that if the trial court, on motion for an instructed verdict at the close of the testimony, reserved the question of law for a later consideration and submitted the case to the jury subject to a later determination by the court of that question of law, the trial court, and also the Court of Appeals, could grant judgment, notwithstanding the verdict, without an unconstitutional deprivation of the right to a jury trial. Rule 50(b) might have been drawn so as to provide that if the trial court reserved the question of law and submitted the case to the jury subject to a later determination as to whether there was sufficient evidence to go to the jury, the trial court, and in its turn the appellate court, could in a proper case order judgment, notwithstanding the verdict. If the rule had been drawn that way, the result would have been in many cases that the lower court might have denied a motion for a directed verdict, without making any reservation of the right to later determine the suffi-

ciency of the evidence to go to the jury, with the result under the decision in the *Redman* case that the Court of Appeals would have been in no position to direct judgment, notwithstanding the verdict. It seemed better, therefore, to provide, as the rule does, that in denying a motion for a directed verdict the trial court will be "deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion", whether the trial court said so or not.

The result is that under Federal Rule 50 (b), regardless of whether the trial court says it is doing so, there is a reservation for future determination of the question raised by the motion to direct. In every case, therefore, where a motion for directed verdict is not granted, under Rule 50 (b) the situation is precisely the same as if the trial court said, "I think I will submit this case to the jury and take its verdict and reserve for later determination the question whether the motion for a directed verdict should be granted." The result is that the trial court automatically makes no decision on the motion to direct, where it is not granted. He makes no decision on the motion to direct, unless it is brought up before him in a proper way after the verdict by motion for judgment, notwithstanding the verdict.

Where, therefore, a motion for a directed verdict is made and not granted, and an appeal is taken from the judgment against the moving party, without there having been first a motion, notwithstanding the verdict, before the trial court, the trial court has not committed any error in failing to grant the motion for a directed verdict, because he has made no decision on the point but reserved it for future determination and that future ruling by the trial court has never been made because he has not been asked to make it by a motion provided for in the rules for a judgment, notwithstanding the verdict.

It seems clear, therefore, that by virtue of the provision in Rule 50(b) to the effect that a trial court shall always be deemed to have reserved decision on the question, it necessarily follows that, in order to force him to a decision, the motion for judgment, notwithstanding the verdict, must be made, even though the rule does not expressly say it is mandatory, and we see no theory on which the appellate court can order judgment, notwithstanding the verdict, if the trial court has never made a ruling on the point. The fair implication of the rule is, therefore, that the party who has moved for an instructed verdict which was not ordered, waives this point and waives that motion if he does not follow it up by asking a ruling of the trial court in the form of a motion for judgment, notwithstanding the verdict.

The court below in its opinion states (R. 56-57):

> "We do not by this rule make it necessary for the trial court even to say, 'I am reserving the question of law.' That is a form anyway, and we make it safe in all cases by the device of prescribing that wherever he refuses to grant a motion for directed verdict he is deemed to reserve the question of law, taking the verdict subject to his later determination, and consequently may on motion afterwards set aside the verdict, grant judgment notwithstanding, and the circuit court of appeals may take the same action."

That statement which Mr. Mitchell made says that the *trial court* "may on motion afterwards set aside the verdict, grant judgment notwithstanding, and the circuit court of appeals may take the same action." The court below apparently thought this statement was intended to assert that the circuit court of appeals may order judgment, notwithstanding the verdict, regardless of whether a motion to that effect was made in the trial court. Obviously Mr. Mitchell had no intention of making any such statement,

and we do not think the recorded statement is susceptible of that interpretation. When he said that the circuit court of appeals may take the same action, he meant that, if a motion was made in the trial court for judgment, notwithstanding the verdict, and that motion was denied, the circuit court of appeals could nevertheless order judgment, notwithstanding the verdict. Mr. Mitchell's quoted statement says that the trial court may "on motion" grant judgment, notwithstanding the verdict, and the statement that the circuit court of appeals "may take the same action" *necessarily* means it may do so if a motion to that effect has been made in the trial court because one does not make motions in an appellate court for judgment, notwithstanding the verdict. Apparently the court below overlooked this fact. Mr. Mitchell did not state that the circuit court of appeals could order judgment, notwithstanding the verdict, if no motion to that effect had been made in the trial court, and we believe it will be obvious to this Court upon careful consideration of the matter that the court below misconstrued the intent of Mr. Mitchell in the language quoted in its decision.

B. The fact that the record does not disclose the evidence petitioner could produce in a second trial is no ground for reversal.

Respondent in its brief (p. 9) asserts there is nothing in the record to suggest that petitioner's case would be altered in any material respect if a new trial were granted. There was sufficient evidence produced to persuade the jury in holding the insured to have been permanently and totally disabled; and to persuade the trial court that the case should have been submitted to the jury. Because there was insufficient evidence submitted to persuade the circuit court of appeals that the insured was totally and perma-

nently disabled, respondent urges this as ground for reversal.

In the course of a trial, the trial attorney does not take up unnecessarily the time of the court in producing cumulative testimony. The trial attorney when it appears that sufficient evidence is introduced, there is no reason for taking the time of the court and going to the expense of adducing additional evidence.

If this Court should hold that there is any defect in the *quantam* of the testimony introduced here, upon a new trial the petitioner can supply the requisite defects.

He should be given that right, and he is entitled to a new trial unless this Court has overruled its previous decision in the *Slocum* case, *supra*. In the *Redman* case, this Court distinguished the *Slocum* case and did not contend that the previous decision in the *Slocum* case was overruled.

C. Even assuming that motion for judgment N. O. V. would have achieved no different result in this case, yet that is no reason for asking this Court to approve the action of the court below and thus establish this very dangerous precedent.

The mere fact that the trial court in this case *might* have denied defendant's motion for judgment *non obstante veredicto* is no reason for the rule to be construed as it was done by the circuit court of appeals. In another case, the trial judge *might* think differently if the required motion had been made. Clearly, the fact (if it be a fact—which is not conceded) that this trial judge *might* have overruled the motion *non obstante veredicto*, did not authorize or license the circuit court of appeals to direct entry of judgment in favor of the United States.

The rule *requires* that a motion *non obstante veredicto* be made, and it is respectfully submitted that this requirement is not satisfied merely because the trial court *in this*

case might have been in a state of mind to deny it if it had been made. That is purely conjecture, and is no proper basis for this Court to use in basing so important and vital a decision with respect to this rule.

The circuit court of appeals should not be permitted to do that which the trial court itself had no opportunity to do.

III.

A. That part of the decision of the court below which refers to alleged error in excluding evidence was *dictum* only and was not a part of the court's decision.

The court below in its opinion stated:

> "Although it no longer becomes necessary for the purposes of this opinion to consider the correctness of the District Judge's rulings on the evidence, we do feel that one of these rulings was of such importance as to merit our present consideration." * * *

A reading of that part of the court's opinion referring to the exclusion of evidence and the instruction of the trial court shows clearly that this portion of the court's opinion is nothing but *dictum*. The court below obviously did not base its decision upon this point, but merely mentioned it in passing. This point was not raised in connection with the granting of this writ and is not properly for consideration by this Court upon the issues here presented.

Clearly petitioner was as much damaged as respondent by this ruling of the court, and even though the ruling might be considered erroneous, it was not prejudicial but harmless. Further, petitioner attempted to offer evidence (R. 22) examination reports dated December 18, 1935, and June 30, 1936, contained in plaintiff's Exhibit No. 1. However, these examination reports were objected to by *this respondent* and by reason of such objection, were excluded by the court.

We submit, therefore, that this Court should not consider this point, because the result of the court's rulings upon the admission of evidence was as fair for one side as it was for the other. To now permit this respondent to use as a basis for reversing this case the action of the trial court in excluding evidence over a certain period of time, when this respondent, by counsel, objected to similar evidence, would not be in keeping with substantial justice.

B. No proper foundation was laid by respondent in the trial court for raising a question as to the action of that court in excluding this evidence; and respondent waived any right that might have existed in this respect.

In any event, respondent has waived the right to claim error with reference to this evidence by failing to give any offer of proof of the insured's condition after he was adjudicated insane. As we read the record, we find no indication that defendant had testimony available to this effect.

Rule 43 (c) of the Rules of Civil Procedure[1] requires the examining attorney to make a specific offer of what he expects to prove by the answer of the witness. No such offer was made by counsel for respondent in this case. The general rule unquestionably is that a party may not predicate error upon the exclusion of evidence unless there has

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[1] Rule 43(c) of the Rules of Civil Procedure provides:

"*Record of Excluded Evidence.* In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged."

been at the trial, "an offer of relevant proof specific, not so broad as to embrace irrelevant and immaterial matter and made in good faith". *Central Pacific Ry. Co.* v. *California*, 162 U. S. 91 at 117, 16 S. Ct. 766, 40 L. Ed. 903 at 912.

Because no offer of proof was made by appellant with respect to any evidence it desired to offer covering the period after the insured was adjudicated incompetent by the county court, the record here, as in the case of *Ricketts* v. *United States*, 32 F. (2d) 943, 59 App. D. C. 47, makes it impossible to determine whether the questions appellant would have asked and the answers to said questions were relevant and material and, if so, whether their exclusion was prejudicial to the defendant's cause.

In this case, as in the case of *United States* v. *Witbeck*, 113 F. (2d) 185 (at page 187) the record now before this Honorable Court discloses no error, and accordingly it must be assumed there was none.

Conclusion.

For the reasons stated above, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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